

Application No.: 09/837800

Case No.: 48317US033

REMARKS

Claim 33 has been amended to clarify that the single flexible flap has only one stationary portion and only one free portion, that the valve can remain substantially closed under any orientation, and that the flap exhibits a curvature while in the closed position.

New claims 69-72 have been added to this application. Thus, claims 33-72 are now pending.

Double Patenting Rejection

Claims 33-68 of this application have been rejected for double patenting. Applicants' invention requires a flexible flap that is mounted to the valve seat such that the one free portion of the flap exhibits a curvature when viewed from the side and is pressed towards the seal surface in an abutting relationship with it when a fluid is not passing through the orifice. The Examiner has not identified any other patent or allowed patent application that claims this feature of applicants' invention.

As the Examiner is aware, a double patenting rejection can only be sustained if the applicant is claiming the same invention that has been claimed in patent or an allowed patent application or if the applicant is claiming an invention that would have been obvious in view of an invention that is being claimed in such a document. In making this double patenting rejection, the Examiner has not indicated whether the double patenting rejection is made under 35 USC § 101 or is made under the judicially-created doctrine of obviousness type double patenting. Because none of the claims that are presented in this case are identical to the claims in any of applicants' copending applications or issued patents, applicants assume, in making the following argument, that the claims have been rejected based on obviousness-type double patenting.

A double patenting rejection cannot be sustained for obviousness-type double patenting when no evidence has been presented to demonstrate that applicants' claimed invention is obvious over an invention claimed in any issued patent or allowed patent application. Obviousness-type double patenting is a judge-made doctrine that prevents an extension of the patent right beyond the statutory time limit. This type of rejection can only be sustained when the claimed subject matter is not patentably distinct from the subject matter claimed in a commonly-owned patent.¹ The purpose

¹ *In re Bratt*, 19 USPQ2d 1289, 1291-92 (Fed. Cir. 1991).